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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 236

IN THE MATTER OF
KORACH BROS., A LIMITED PARTNERSHIP,
Petitioner,

vs.

EARL W. CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

The above named Petitioner respectfully alleges as follows:

1. This is a petition pursuant to Rule 38 of this Court for a Writ of Certiorari to the United States Emergency Court of Appeals to review the final judgment of the said Court dismissing the complaint of the Petitioner, in the case of *Korach Bros., a Limited Partnership* v. *Earl W. Clark, Director of the Division of Liquidation, Department of Commerce* (Docket #332 in said Court).

2. This Court has jurisdiction over the subject matter of this petition pursuant to U. S. C. Title 50 App., Sec.

924 (d) (Emergency Price Control Act, January 30, 1942, c. 46, 56 Stat. 23), and Sec. 240 of the Judicial Code, as amended. (U. S. C. 1934 Ed. Title 28, Sec. 347.) The judgment of the Emergency Court of Appeals referred to above was made July 11, 1947. The opinion of the Court appears at the end of the transcript submitted herewith. As appendix, the pertinent portion of the Maximum Price Regulations are attached to this brief.

SUMMARY OF THE MATTER INVOLVED.

This petition presents a single question:

Whether the provisions of RMPR 287—Manufacturer's Prices for Women's, Girls', Children's and Toddlers' Outerwear garments; (misses' and junior misses' dresses were classified as category 22 in Appendix A of Section 27 of RMPR 287); requiring a delivery of a single garment during the month of March, 1942, is a valid and reasonable regulation or whether said regulation results in an undue discrimination among equals and is brought about by chance rather than a scientific approach to pricing.

STATEMENT OF THE MATTER INVOLVED.

Your petitioner manufactures women's outerwear garments, among them misses' and junior misses' dresses in the $57.00 and $66.00 per dozen price lines. Petitioner has been in business for more than 25 years, with a substantial capital invested, and has a business of substantial volume. The Price Administrator claimed that by selling these two price lines petitioner had violated the provisions of RMPR 287—Manufacturers' Prices for Women's, Girls', Children's and Toddlers' Outerwear Garments.

A brief summary of the bases of these regulations is as follows:

(a) The Emergency Price Control law enacted on January 30, 1942.

(b) The General Maximum Price Regulation issued by the Office of Price Administration on April 28, 1942, effective May 11, 1942, 7 F. R. 3153. Section 1499.2(a) thereof established maximum prices for commodities at

> "The highest price charged by the seller during 1942: for (1) the said commodity"

and defines highest price charged as

> "(a) the highest price which the seller charged for a commodity delivered * * * by him during March, 1942 * * * or, (b) if the seller made no delivery * * * during March, 1942, his highest offering price for delivery * * * during that month * * *."

(c) MPR 153 was issued May 23, 1942, effective May 29, 1942. It applied to all new styles of women's outerwear garments delivered for the 1942 Fall season. It set maximum prices on the basis of the highest price charged

by the seller for garments of the same type, having substantially equal workmanship and quality, delivered to a purchaser of the same class, between July 1 and September 30, 1941. In those cases where a seller did not so deal, then he was referred to the highest price charged by his most closely competitive seller of the same class for substantially the same garment, during the period from July 1 to September 30, 1941.

(d) MPR 287 was issued December 12, 1942, and applied to Spring and Summer selling seasons with respect to manufacturers only. Its general provisions as to highest price line were incorporated as to retailers and wholesalers in RMPR 330, which action is foreshadowed in the statement of considerations issued for MPR 287. (Tr. 114, 115.) It forbade the sale of merchandise by a manufacturer in a price line higher than the price lines delivered by him during March, 1942. The term "delivered" was not defined in MPR 287. (See Sec. 1389.368.) Until this case, question existed as to whether a constructive delivery was within the meaning of the term. (See, for instance, statement of Board of Review, Tr. 92.)

(e) Amendment No. 3 of RMPR 287, issued on October 16, 1944, first enunciated the "5% rule" by way of redefinition of "selling price line." This term was redefined as

> "The price at which a manufacturer first offered to sell to his general trade a style of garment on the occasion of its first cutting and at which a number of garments equal to at least 5% of the number of garments contained in that cutting were delivered." (Tr. 153.)

There was and is no requirement that this delivery occur during any particular period. The regulation states that it was for the purpose of avoiding "a typical or freakish sales of a very small number of garments." (Tr. 153.)

Petitioner sought information as to when the Administrator first determined that 5% delivery was required prior to March 31, 1942, and whether he had ever issued any notice or bulletin with respect thereto, and whether there had been any legal interpretation by the Administrator or any subordinate. (Tr. 169.) This application for assistance was denied on the grounds that this was beyond the scope of the additional evidence which Petitioner was privileged to introduce. (Tr. 180.)

In view of the holding of the Emergency Court that RMPR 287, as amended by Amendment No. 3, must be construed as authorizing the inclusion in the manufacturer's spring pricing chart of a selling price line at the price at which the garment in question was first offered in sale to the manufacturer's general trade on the occasion of its first cutting, and providing that only a number of garments equal to at least 5% of the first cutting were delivered at that price at some time, but not necessarily during or before March 31, 1942, Petitioner raises no issue with, nor questions in any manner, the finding of the Emergency Court regarding the construction of RMPR 287, as amended by Amendment No. 3, regarding the 5% requirement.

Petitioner in the months of August and September, 1941, undertook the designing and planning of a line of women's cotton and synthetic fabric dresses to sell at prices of $57 and $66 per dozen respectively. (Tr. 9.) Accordingly, in August, 1941, it began the purchase of piece goods for fabrication in the $57 and $66 per dozen lines. By the month of March, 1942, petitioner had expended in excess of $77,000 in such piece goods purchases. (Tr. 5, 9, 13.) By December, 1941, the operation was complete enough for the preparation of a budget by petitioner and its accountants in connection with the manufacture of the two

price lines. The sum of $100,000 was appropriated by petitioner for this purpose. (Tr. 5, 10.)

Prior to January, 1942, a special designer, a special salesman, and a special pattern maker had been employed for these two price lines. Separate salesrooms were leased in January, 1942, at 310 West Jackson Boulevard, Chicago, Illinois, for the sole purpose of selling these two price lines. (Tr. 6, 10.)

About January 1, 1942, the sales of the $57 and $66 per dozen lines of dresses were commenced by petitioner, and by the end of March, 1942, petitioner had obtained and accepted *bona fide* uncancellable orders at said prices for dresses in these two price lines to representative department stores and customers throughout the United States. The total amount of said orders was substantially in excess of $100,000. (Tr. 5, 10, 22-27, 73.)

In order that there be no misunderstanding about the genuineness of these orders, petitioner filed with the Administrator photostatic copies of many of them.

Cutting of the various styles of dresses included in these two price lines began in February, 1942, and by March 30, 1942, many thousands of dozens of said dresses had been cut. (Tr. 5, 10, 14.)

Accordingly, prior to the end of March, 1942, heavy and substantial investments had been made by petitioner in the $57 and $66 per dozen price lines. Materials and labor charges for the month of March, 1942, alone, applicable to the $57 and $66 lines, exceeded $43,000. (Tr. 5, 10.)

There were no facilities for manufacturing at 310 West Jackson Boulevard, Chicago, and all garments when delivered there were ready for shipment to customers. (Tr. 10, 18.)

In the month of March, 1942, inter-factory shipments were made, as evidenced in inter-factory shipment receipts, to 310 West Jackson Boulevard, of merchandise in the $57 and $66 per dozen price lines. (Tr. 10, 38-45 inc.)

Commencing about March 28, 1942, customers selected garments for filling orders which they had theretofore placed for these price lines. (Tr. 11.) During and prior to the week commencing March 30, 1942, numerous customers of petitioner came to the premises at 310 West Jackson Boulevard, Chicago, inspected the merchandise there, selected merchandise for themselves, and directed its packing and shipping to themselves. (Tr. 6, 19, 20, 46, 47, 50, 55, 56, 60.)

The organization at 310 West Jackson Boulevard was new and inadequate. Bills to customers accordingly were not rendered until April 1, 1942. However, by April 6, 1942, in excess of $9,500 of merchandise had been billed and shipped to customers in the $57 and $66 price lines. Bills to over eighty customers were rendered on April 3, 1942. By April 8, 1942, in excess of $13,000 of invoices were rendered to customers for merchandise delivered to them in the $57 and $66 lines. Exhibit "B" to affidavit of Herman Korach, filed June 20, 1945, includes a partial list of these invoices. (Tr. 28-36 inc.)

The office at 310 West Jackson Boulevard was closed after a few months and in the moving of records to the premises of petitioner at 913 West Van Buren Street, Chicago, Illinois, additional records relating to shipments were misplaced or lost. (Tr. 11.)

In the Spring and Summer selling season of 1942, petitioner delivered 2318¼ dozens of dresses in the $57 price line at gross dollar sales of $132,140.25; 90¼ dozens in the $60 price line at gross dollar sales of $5,405.10; and

1612 5/12 dozens in the $66 per dozen price line at gross dollar sales of $106,419.46; total sales, therefore, for these three challenged price lines for the Spring and Summer selling season of 1942 aggregated 4020 9/12 dozens at gross dollar sales of $243,964.81. (Tr. 164.)

Petitioner continued to sell in these price lines. In 1943 it delivered 8853 3/12 dozens at gross dollar sales of $535,158.23; in 1944 it delivered 6498½ dozens at gross dollar sales of $376,434.42; in 1945 it delivered 9179½ dozens at gross dollar sales of $573,412.76. This merchandise was sold under the trade name "Johnnye Juniors" throughout the United States. Extensive advertising was done by Petitioner to protect these lines and the trade name. (Tr. 165, 166.) These price lines were part of a complete line of garments which had to be sold by Petitioner to offer a complete line of junior dresses. (Tr. 165, 166, 170-177 inc.)

Petitioner's records had been examined by agents of the office of Price Administration on numerous occasions. (Tr. 7.) It was not, however, until May, 1945, that Petitioner's right to sell in the $57 and $66 lines was challenged by the Administrator. Subsequently, the Administrator filed suit against Petitioner for triple damages on account of all sales made in the $57 and $66 price lines aggregating some million and a half dollars. (Tr. 92.)

The grounds upon which Petitioner challenged the highest price line limitations under RMPR 287 are substantially similar to those upheld in *Ward* v. *Bowles*, 147 F. (2d) 858; the standard of deliveries was uncertain, confusing and conflicting, the provisions of the regulations, if interpreted as requiring an actual physical delivery, were not only discriminatory and unfair, but not brought about by any scientific approach to price control, but by mere chance and hazard. (Tr. 3, 4.)

The Administrator impanelled a Board of Review (Tr. 86-89 inc.) which issued a report and recommendations on March 22, 1946, (Tr. 91) recommending denial of the Protest. The Board of Review held that since *Ward* v. *Bowles, supra,* involved a retailer and Petitioner is a manufacturer, it did not apply (Tr. 97); that delivery was the only sound test; that Petitioner was not engaged in the selling of the $57 and $66 price lines (Tr. 102); that Petitioner's sales in the $57 and $66 price lines were experimental only. (Tr. 107.) Petitioner filed additional proof as to the scope of its sales in the $57 and $66 price lines over the period of 1942 to 1945, inclusive, (Tr. 164, 165) as well as certain other data to the effect that March of any year was not the peak of its spring selling season. (Tr. 166, 167.)

Thereupon the Administrator without a hearing before a Board of Review entered an "Opinion and Order upon Reconsideration" again denying the protest. (Tr. 193.)

The Emergency Court of Appeals on July 11, 1947, entered a judgment dismissing the complaint, holding that in its decision in *Modern Manufacturing Company, Inc.* v. *Fleming,* 160 F. (2d) 892 (E. C. A. 1947), the delivery requirement of the highest price line provision, when applied to manufacturers rather than to retailers, was reasonable and non-discriminatory, and that it adhered to that conclusion. The Emergency Court also held that it found no merit to Petitioner's contention that Section 12(b) of the Price Control Extension Act of 1946 compels a contrary result.

Section 12(b) of the Price Control Extension Act of 1946 provides as follows:—

> "The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Ad-

ministrator shall determine (1) that the transactions on which such proceedings is based consisted of the manufacturer's selling such an item at his published March 1942 price list prices instead of his March 1942 delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March, 1942 delivered prices. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204."

Petitioner contends that the passage of this amendment expressly repudiates the delivery requirements of RMPR 287 *ab initio*.

Petitioner has no quarrel with and does not raise any question in connection with the interpretation placed by the Emergency Court of Appeals in its decision as to the construction of Section 7(a) of RMPR 287, as amended, that the requirement that a manufacturer must have delivered 5% of the first cutting of the style at the price sought to be established, and that said 5% out of the first cutting at initial prices shall be considered even though some of them were made after March 31, 1942. This Petitioner takes issue with the validity of the requirement of RMPR 287, as amended, that a single garment or garments had to be delivered prior to March 31, 1942.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The reasons relied upon for the allowance of the writ herein are:

(1) The highest price line limitation of MPR 287, as amended, is invalid and should be set aside, and is contrary to the decision of the Emergency Court of Appeals in *Ward* v. *Bowles*, 147 F. (2d) 858.

(2) The present decision is in conflict with the reasoning and language of the opinion in *Modern Manufacturing Company, Inc.* v. *Fleming*, 160 F. (2d) 892 (E. C. A. 1947). In *Modern Manufacturing Company, Inc.* v. *Fleming*, *supra*, at page 896, the manufacturer had in fact neither engaged in the first cutting nor the initial delivery of the styles involved until after March 31, 1942, and had committed no goods to production prior to April 1, 1942, whereas in the instant case the manufacturer had engaged in substantial cutting and had committed the goods involved in the price lines sought for in heavy production prior to March 3, 1942.

(3) The amendment of sub-section 12 of Section 205(e) of the Price Control Extension Act of 1946 was a recognition by Congress of the unreasonableness and invalidity of the requirements of MPR 287 and RMPR 287, and operated as a repeal thereof.

SUMMARY OF ARGUMENT.

I.

The Highest Price Line Limitation of MPR 287, as Amended, is Invalid and Should Be Set Aside, and is Contrary to the Decision of the Emergency Court of Appeals in *Ward* v. *Bowles*, 147 F. (2d) 858.

II.

The Present Decision is in Conflict With the Reasoning and Language of the Opinion in *Modern Manufacturing Company, Inc.* v. *Fleming*, 160 F. (2d) 892 (E.C.A. 1947).

III.

The Amendment of Sub-section 12 of Section 205 (e) of the Price Control Extension Act of 1946 Operated as a Repeal of the Requirements of MPR 287 and RMPR 287.

ARGUMENT.

I.

The Highest Price Line Limitation of MPR 287, as Amended, Is Invalid and Should be Set Aside, and Is Contrary to the Decision of the Emergency Court of Appeals in Ward v. Bowles, 147 F. (2d) 858.

Ward v. *Bowles,* 147 F. (2d) 858, involved the validity of the highest price line limitation contained in MPR 330, as applied to a retailer, on the basis of an actual delivery during March, 1942. The restrictions were similar to those imposed under MPR 287. This Court said so:

> "The limitation was applied at retail and wholesale levels by Maximum Price Regulation 330. At the manufacturing level, generally similar restrictions were imposed by Maximum Price Regulation 287."

The administrative history moreover makes it amply clear that the two regulations were part of the same piece. The statement of considerations regarding MPR 287 refers to the subsequent regulation to be issued for retailers and wholesalers. (Tr. 114, 115.) The statement of considerations under MPR 330 not only refers to the Maximum Price Regulation 287, but makes reference to the statement of considerations involved in the issuance of Maximum Price Regulation 287. (Tr. 134.) The similarity extends even further. The specific provisions of MPR 287 are practically identical with the provisions of MPR 330. MPR 287 required the filing of a pricing chart, predicated on garments delivered during March, 1942. (See Section 6.) Rule 1 of the pricing rules provided:

> "A manufacturer may sell garments in any selling price line listed on his pricing chart for garments of

the same category number, but he may not sell in a selling price line higher than the highest listed on his pricing chart in effect on the date of delivery for garments of the same category number."

The rule in MPR 330 was:

"The rule is that you may not under any circumstances sell any garment at a higher price than the highest price line at which you delivered a garment of the same category number during March, 1942."

This is the provision held invalid by the Emergency Court of Appeals as discriminatory and unfair and not brought about by any scientific approach to price control but rather by an appeal to chance (147 F. (2d) 864):

"In the form in which the Regulation was drawn there can be no doubt but that merchants in the same situation were subjected to different price controls. Let us assume two merchants in March 1942 were engaged in selling garments from the same price lines; one made a delivery in his highest price line during that month, the other did not. In such event the former would be permitted to continue his business unimpaired as to his previous price lines, whereas the latter would be required to eliminate from his business sales in all lines above the highest in which he had made a delivery. The discrimination is obvious and was brought about not by reason of any scientific approach to price control, but by what may have been a turn of the wheel of chance. Failure of a merchant to deliver in March 1942 from his highest price line might have occurred because of weather conditions in his location; because the style of garments which he handled in his highest price line during that month chanced not to meet with favor; because he was temporarily out of stock in his highest price line; because of inadequate advertisements or displays; or any number of other misfortunes. We may not assume that failure to make a delivery in a price line for such reasons would, in the normal course of events, result in his abandonment of the price line. Certainly in

many cases it would not. Nevertheless the Regulation forced such abandonment, while at the same time more fortunate merchants in the nation suffered no such result in the conduct of their businesses."

The Administrator did not appeal from this decision.

The circumstances which affect a manufacturer are always fortuitous. If the science of manufacture consists of having the right raw materials with the right equipment and the right labor at the right time, evidence from even the greatest manufacturing concerns in the country shows that these conditions are more often desired than met. This record itself plainly shows the arbitrary and perchance application of any March delivery date.

It is plainly evident on the face of this record that Petitioner had merchandise in the $57 and $66 lines ready for delivery to customers in March of 1942. (See records of interfactory shipments of completed garments indicating an inventory of 1250 dozen garments. (Tr. 38-45 inc.) It had orders for these garments well prior to March 31, 1942. In this respect it was precisely like a retailer. Moreover, there was nothing fictitious about any of these transactions. These goods had been sold and were delivered and paid for. In excess of $9,500 of merchandise had been billed and shipped by April 6, 1942. On April 3, 1942, over 80 customers were invoiced. By April 8, 1942, in excess of $13,000 of bills had been rendered to customers for merchandise in the challenged price lines. However, because of difficulties in connection with the organization of packing routines, shipping procedures and billing procedures, and the lack of adequate personnel, the shipment of this merchandise was delayed. It is purely upon this set of unfortunate circumstances that the Administrator now seeks to inflict upon Petitioner a penalty in excess of one and one-half million dollars. The regu-

lation is, of course retroactive, and it was not until 1943 that a legal consequence was sought to be attached thereto.

It was purely a matter of chance that shipments in volume were not made earlier. These circumstances are all of a piece with those characterized by the Emergency Court in *Ward* v. *Bowles* (142 F. (2) 864):

> "Failure of a merchant to deliver in March, 1942, from his highest price line might have occurred because of weather conditions in his location, because the style of garments which he handled in the highest price line during that month chanced not to meet with favor, because he was temporarily out of stock in his highest price line, because of inadequate advertisements or displays, or any number of other misfortunes."

Petitioner had not merely offered to sell garments in the $57 and $66 price lines, but it had irrevocably committed to production large numbers of garments in these lines. 1250 dozen garments (Tr. 38-45 inc.) had been cut, manufactured and completed as represented by interfactory shipments before the end of March, 1942. All these garments had been ordered long before March 31, 1942. Petitioner was exactly like a retailer in respect thereto. It had the garments in stock.

Admittedly the Petitioner had committed to production and completed the production of over 1250 dozen garments in the $57 and $66 price lines. (Tr. 38-45 inc.) Admittedly these garments were in inventory in the same manner as a retailer would have an inventory of his merchandise. Admittedly the orders for these garments had been on hand well prior to March 31, 1942. Because of the difficulties in connection with the organization of packing routines, shipping procedures and billing procedures, and lack of personnel, the shipment of the merchandise was delayed. To state that because of the accident or failure

of the delivery of one garment prior to March 31, 1942, Petitioner cannot be in the business of manufacturing and selling the $57 and $66 price lines, is merely the result of an arbitrary ruling that bears no reasonable relationship to the purpose sought to be obtained. Petitioner conclusively proved that it was in the business of manufacturing and selling the $57 and $66 price lines prior to March 31, 1942; yet it must be barred from this business because of the accidental nondelivery of a single garment.

The purpose of the regulation was to confine manufacturers to the lines, the manufacturing and selling of which they were already engaged in. The delivery of a single garment sheds no light as to whether or not the manufacturer was engaged in the business of manufacturing and selling these lines. To rule that the manufacturer is barred from these lines due to the lack of delivery of a single garment, deprives him unreasonably of the lines under the facts of this case. Similarly, the delivery of a single garment would not prove that it was engaged in the manufacture and sale of such lines. In other words, the delivery of one garment would not prove that the manufacturer had committed merchandise to production in these lines on a substantial basis, and the failure to deliver one garment does not prove that the manufacturer was not substantially engaged in such production, and had not committed to production merchandise in these lines. It would seem to Petitioner that before it should be penalized to the extent of one and one half million dollars, the standard of conduct penalizing him should be a reasonable one and should bear some reasonable relation to the end sought to be achieved.

We maintain that the single garment delivery requirement before March 31, 1942, neither proves nor disproves that Petitioner was engaged in the business of manufacturing and selling the $57 and $66 lines, and it is not a

regulation that of itself would tend to carry out the purpose of the Price Control Act.

To these considerations should be included the Administrator's policy with respect to new firms. The Administrator admits that new manufacturers "are authorized highest price lines in excess of $66 per dozen where their principals have responsible base period experience in the manufacture of garments selling at price lines higher than that price." (Tr. 181.)

Now, upon these considerations, let us suggest a few hypothetical examples to the Court:

Firm A cut 20 garments in the $66 price line during March, 1942. It delivered 1 garment. Since this delivery was 5% of the first cutting, it is entitled to the $66 price line.

Firm B was not in business during March of 1942, but one of its partners had "responsible experience" with some other firm which had manufactured a $66 line. The Administrator will allow this firm the $66 price line.

Firm C cut 100 garments in 1938. It delivered 5 garments, one of which was delivered in March of 1942. It is entitled to the $66 price line.

Firm D made no deliveries of any kind in March, 1942. However, it did make deliveries during October, November and December of 1942. These, of course, would be months when the prices would be highest, being the Fall season. This is admitted by the Administrator: "Many manufacturers customarily have higher selling price lines in the Fall than in the Spring." (Tr. 136.) Nevertheless, under Rule 5 of RMPR 287, the highest price line for Firm D is predicated upon deliveries for October, November and December, 1942.

Petitioner, on the other hand, was actually manufacturing a $66 price line during March of 1942, for which it had

an inventory of finished garments and orders. It cut several thousand of dozens of garments. For it the standard is not responsible manufacturing experience, nor the delivery of one garment, but rather the delivery of several hundred. If it had cut less, it need not to have delivered as much. If it had not been in business, it would have had greater rights than the Administrator now concedes it. Its own responsible experience in manufacturing in the contested price lines not only does not count, but in fact prejudices it. Because those persons who had had experience in higher price lines other than their partners were employees of complainant rather than principals, it is again disqualified.

And, of course, the fact that Petitioner rendered invoices within 72 hours after March 31, 1942, to in excess of 80 persons, firms and corporations throughout the country in the contested price lines, insofar as the Administrator is concerned, is without consequence.

The only obvious conclusion to be drawn from this experience is that Petitioner was unfortunate and that other firms were fortunate. There can be no basic distinction in law or in fact between any of the examples except to say that what was one firm's luck was another one's sorrow. Such is the rule of Price Control, which can best be characterized by "The wheel of fortune turns and rolls and where it stops nobody knows."

II.

The Present Decision Is in Conflict With the Reasoning and Language of the Opinion in Modern Manufacturing Company, Inc. v. Fleming, 160 F. (2d) 892 (E. C. A. 1947).

The decision in the *Modern Manufacturing Company, Inc.* case, which the Emergency Court in its opinion in the case at bar claimed it adhered to, in fact is inconsistent with the decision of the court in the case at bar. In *Modern Manufacturing Company, Inc.* v. *Fleming*, the manufacturer merely had received orders from customers in advance of commencing actual production. Prior to April of 1942, none of the garments were ordered to be cut, nor was any actual cutting commenced, and it was only during the middle of April, 1942, that the actual cutting was commenced, and there was no delivery prior to April 30, 1942. Under these circumstances, the Emergency Court said in *Modern Manufacturing* v. *Fleming*, at 160 F. (2d) 892, at page 896:

> "Mere offers to sell in a particular price line or the receipt of some orders without committing the goods to production prior to the end of March, 1942, is not sufficient to demonstrate that complainant was established in that price line during the base period."

We have no quarrel with this reasoning. However, in the case at bar, as we have already indicated, the Petitioner had accepted substantial orders taken prior to March 31, 1942. It had not only committed to production but had completed the production by March 31, 1942, 1250 dozen garments in the $57 and $66 price lines. The production had been fully completed and the garments were on hand in inventory. (Tr. 38-45 inc.)

The Court, while purporting to adhere to its opinion in

Modern Manufacturing Company, Inc. v. *Fleming, supra,* in fact disregarded its reasoning in the case at bar, and its decision in the case at bar must be taken to be in conflict with and not in adherence to the reasoning in its decision in *Modern Manufacturing Company, Inc.* v. *Fleming.*

The failure of the Court to apply the same reasoning to the case at bar as it did in *Modern Manufacturing Company, Inc.* v. *Fleming,* results in the application of regulation admittedly unreasonable and discriminatory as applied to Petitioner.

III.

The Amendment of Sub-Section 12 of Section 205(e) of the Price Control Extension Act of 1946 Operated as a Repeal of the Requirements of MPR 287 and RMPR 287.

The history of the Price Control law with specific reference to these provisions discloses a marked lack of enthusiasm on the part of the courts or Congress for incongruous results of this character.

In *Bowles* v. *Good Luck Glove Co.,* 52 F. Supp. 942, the Administrator sought to inflict upon the glove company damages by reason of its sale of gloves at its March 1942 quoted prices in contrast to its March 1942 delivered prices. The company sold a number of styles of gloves, some of which it delivered in March, 1942, others of which it did not deliver, but had entered into contract for future delivery at varying prices. The result was that certain gloves more expensive to manufacture actually would require sale at a lesser price than cheaper gloves upon which a delivery had been made. The District Court, holding for

the defendant in the enforcement action, repudiated the Administrator's reasoning.

> "I think it was never the intention of the Congress or of the Office of Price Administration in providing anti-inflationary rules to fix by highly technical construction a ceiling price in May, 1942, at prices charged in March for goods delivered on previously existing contracts, and thus upset or disturb the economic practices of industry contributing essential war goods. I believe rather that it was the intent to fix the ceiling at the highest current price of March and where deliveries were not made upon current purchases, but only upon previous purchases, then to fix the ceiling by reference to the prices of equivalent, similar or substantially the same merchandise which experience has demonstrated under a certain fixed ratio in price to those actually sold in March."

The Circuit Court of Appeals affirmed and adopted the opinion of the trial court as its own. (143 F. (2) 579.)

Subsequent thereto, the Supreme Court in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 89 L. ed. 1700, determined that the Administrator might predicate an enforcement action upon the requirement of an actual delivery. The Court specifically reserved the question, however, as to whether such an interpretation was constitutional or valid holding that this issue must be first presented to this Court. Thereupon the Circuit Court was obliged to reverse its prior opinion. (150 F. (2) 853.) (See also *Bowles* v. *Indianapolis Glove Co.*, 150 F. (2d) 597.)

Thereupon Congress in its enactment of the Price Control Extension Act undertook to expressly repudiate this result in the apparel industry *ab initio*.

> "The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on

which such proceeding is based consisted of the manufacturer's selling such an item at his published March 1942 price list prices instead of his March 1942 delivered prices and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March, 1942, delivered prices. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204."

Petitioner has, independently of this proceeding, filed its application before the Administrator for the dismissal of the pending enforcement action in Chicago. That issue may be brought before this Court in a subsequent proceeding.

The legislative enactment, however, is highly significant at this time. It indicates complete congressional repudiation of the policies and purposes pursued by the Administrator in connection with the delivery requirements affecting the highest price line limitations in the apparel industry. Congress did not merely forbid these policies on a hereafter basis. It went further. It told the Administrator that as to all events, past, present and future, he could neither institute nor maintain an action predicated upon the actual physical delivery standards for the month of March, 1942, in the highest price line limitation. The Congress did not even as to these conditions suggest a saving clause as to prior claimed violations.

Conclusion.

The hardship sought to be here inflicted upon Petitioner is self evident if damages in the amount of one and one-half million dollars are of any moment. (Compare Tr. 196.) What has here transpired is not of the standard which a citizen has a right to expect in dealing with his Government. Petitioner was entitled at least to a regulation predicated on something else than the "Wheel of Chance," of an interpretation of that regulation predicated upon the instrument itself and the written considerations supporting it and to a fair and impartial hearing. It had none of these.

MPR 287, as amended, insofar as the requirement of the delivery of a single garment in the category prior to March 31, 1942, is concerned, is unreasonable and discriminatory. The decision of the Court below upholding it fails to follow its own reasoning in *Ward* v. *Bowles, supra,* and also disregards the reasoning in *Modern Manufacturing Company, Inc.* v. *Fleming, supra.*

WHEREFORE your Petitioner respectfully requests that a Writ of Certiorari be directed to the United States Emergency Court of Appeals to review the decision made by that Court in the case of Korach Bros., a Limited Partnership, *vs.* Earl W. Clark, Director of the Division of Liquidation, Department of Commerce.

SAMUEL E. HIRSCH,
JULIAN H. LEVI,
Counsel for Petitioner.

APPENDIX.

General Maximum Price Regulation.

7 Federal Register, Pages 3153, *et seq.*, General Maximum Price Regulation, issued April 28, 1942.

Section 1499.23. *Effective date* (p. 3156-7). All the provisions of this General Maximum Price Regulation shall become effective on May 11, 1942, except that:

(a) The provisions of this General Maximum Price Regulation, other than Sec. 1499.11(a), shall not apply to establishments selling at retail until May 18, 1942;

(b) The provisions of Sec. 1499.1 and 1499.2 shall not apply to any sale of services at retail until July 1, 1942; and

(c) The provisions of Sec. 1499.11(a) shall become effective upon the date of issuance of this General Maximum Price Regulation.

Section 1499.2. *Maximum prices for commodities and services: General Provisions:* Except as otherwise provided in this General Maximum Price Regulation, the *seller's* maximum price for any commodity or service shall be:

(a) *In those cases in which the seller dealt in the same or similar commodities or services during March 1942:*

The highest price charged by the seller during such month—

(1) For the commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or

(b) *In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:*

The highest price charged during such month by the *most closely competitive seller of the same class*—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

"Highest Price Charged During March 1942."

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity *delivered* or service *supplied* by him during March 1942; or

(b) If the seller made no such delivery or supplied no such service during March 1942, his highest *offering price* for delivery or supply during that month.

No seller shall change his customary allowances, discounts or other price differentials unless such changes result in a lower price. The "highest price charged" shall be a price charged during March 1942 to a *purchaser of the same class.* But if during March 1942 a seller (1) had an established practice of making allowances, discounts or price differentials to different classes of purchasers, and (2) raised his general level of prices, but thereafter during March 1942 made no delivery to any purchaser of a particular class, he shall, for that particular class of purchasers calculate the highest price charged by taking the highest price charged during March 1942 to a purchaser of another class and then adjusting such price to reflect his established allowances, discounts and price differen-

tials. No seller shall require any purchaser, and no purchaser shall be permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any commodity or service, than the seller required purchasers of the same class to pay during March 1942 on deliveries or supplies of the same or similar types of commodities or services.

"Similar Commodities or Services."

One commodity shall be deemed "similar" to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed "similar" to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.

Maximum Price Regulation No. 153.

7 Federal Register (p. 3901, *et seq.*), Maximum Price Regulation No. 153, issued May 23, 1942, effective date May 29, 1942.

Sec. 1389.1. *Fall styles of women's, girls' and children's outerwear garments subject to this maximum price regulation,*

(a) This Maximum Price Regulation No. 153 shall apply, and, except as provided in Sec. 1389.4 hereof, the General Maximum Price Regulation[1] shall not apply to

1. 7 F. R. 3153, 3330, 3666.

sales of any new style of any women's, girls' and children's outerwear garments delivered for the first time by the manufacturer of such articles of apparel between July 1 and November 15, 1942, inclusive. Such new styles of women's, girls' and children's outerwear garments are hereinafter called "1942 fall styles".

(b) As used in this Maximum Price Regulation No. 153, the term, "women's, girls' and children's outerwear garments" includes garments of the following types: coats, suits, separate jackets, separate skirts, dresses, blouses, snowsuits, legging sets and separate leggings as defined in Sec. 1389.11 of this Maximum Price Regulation No. 153 * * *.

Sec. 1389.3. *Maximum prices for 1942 fall styles of women's, girls' and children's outerwear garments.* (a) The seller's maximum price for any 1942 fall style of any woman's, girl's or child's outerwear garments shall be determined as follows:

(1) *In those cases in which the seller dealt in a garment of the same type between July 1 and September 30, 1941, inclusive:*

(i) The seller's maximum price shall be the highest price charged by the seller for a woman's, girl's or child's outerwear garment of the same type and of substantially equal workmanship and quality delivered to a purchaser of the same class between July 1 and September 30, 1941, inclusive, except that changes in yardage of material and in style pursuant to the direction of any agency of the United States shall be permitted within any price line; or

(ii) If no such delivery was made, the maximum price shall be whichever is lower of the following:

(a) The lowest price charged by the seller for a garment of the same type delivered to a purchaser

of the same class between July 1 and September 30, 1941, or

(b) The total of the cost to the seller of the garment to be priced plus the percentage margin over cost obtained by the seller on his lowest priced garment of the same type delivered between July 1 and September 30, 1941, inclusive.

(2) *In those cases in which the seller did not deal in a garment of the same type between July 1 and September 30, 1941, inclusive:*

The seller's maximum price shall be the highest price charged by the most closely competitive seller of the same class for a woman's, girl's or child's garment of the same type and of substantially equal workmanship and quality delivered between July 1 and September 30, 1941, inclusive, except that changes in yardage of material and in style pursuant to the direction of any agency of the United States shall be permitted within any price line.

(b) For purposes of this section all garments which fall into any one of the classifications listed in Appendix A, Sec. 1389.13, shall be deemed to be garments of the same type.

Sec. 1389.4 *Incorporation of provisions of the general maximum price regulation.*[1] The provisions of Sec. 1499.4 (*Supplemental Regulations*), Sec. 1499.5 (*Transfers of business or stock in trade*), Sec. 1499.12 (*Current records*), Sec. 1499.13 (*Maximum prices of cost-of-living commodities; statement, marking or posting*), Sec. 1499.15 (*Registration*), Sec. 1499.16 (*Licensing*), Sec. 1499.18 (*Applications for adjustment by retail sellers*), and Sec. 1499.19 (*Petitions for amendment*) of the General Maximum Price Regulation shall apply to all sales for which maximum prices are established by Sec. 1389.3 and to all persons

1. *Supra.*

making such sales. References in Sec. 1499.18 of the General Maximum Price Regulation to Sec. 1499.2 and 1499.3 thereof, for the purposes of this Maximum Price Regulation No. 153, shall be deemed to refer to 1389.3 hereof. The registration and licensing provisions of Sec. 1499.15 and 1499.16 of the General Maximum Price Regulation shall apply to every person selling at wholesale or retail any commodity covered by this Maximum Price Regulation No. 153 with the same force and effect as though this Maximum Price Regulation No. 153 had been issued on or before April 28, 1942. * * *

Sec. 1389.11. *Definitions.* (a) When used in this Maximum Price Regulation No. 153, the term:

(1) "New style" of any woman's, girl's or child's outerwear garment means any woman's, girl's or child's outerwear garment which differs in style, design, ornamentation, or in any other respect from the women's, girls' and children's outerwear garments previously delivered by the same manufacturer.

(2) "Delivered" means received by the purchaser or by any carrier other than a carrier owned or controlled by the seller for shipment to the purchaser.

(3) "Manufacturer" means a person who produces as a result of fabricating, processing or manufacturing, directly or through an agent or contractor, women's, girls' or children's outerwear garments in substantially the same form in which they are purchased by the ultimate consumer, and makes the first sale of such articles in such form. * * *

(13) "Purchaser of the same class" refers to the practice adopted by the seller in setting different prices for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer,

government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.

(14) "Cost to the seller" means:

(i) In the case of any sale at retail or wholesale, the price paid by the seller for the article, after all discounts, allowances and other price differentials, or

(ii) In the case of any sale other than at wholesale or retail, the total of actual material cost, actual trimming cost and direct labor cost, after all discounts, allowances and other price differentials:

Provided, That in no case shall any seller include in his cost any amount, charge or expense established by means of or resulting from a fictitious sale or fictitious billing or fictitious valuation of materials or trimmings.

(15) "Margin" means the difference between the cost to the seller and the selling price.

(16) "Seller of the same class" means a seller: (i) performing the same function (for example, manufacturing, distributing, retailing); (ii) of similar type (for example, department store, mail order house, chain store, specialty shop); (iii) dealing in the same kind of garments, and (iv) selling to the same class of purchasers.

(17) "Most closely competitive seller of the same class" means a seller of the same class who (i) is selling the same kinds of garments, and (ii) is closely competitive in the sale of such garments, and (iii) is operating with substantially the same price line policy, and (iv) is located nearest to the seller.

Pricing Rules.

MPR 287—7 Federal Register, p. 10460-61.

December 15, 1942. Sec. 1389.353(d) "Pricing rules."

A manufacturer may not sell any garments in a selling price line different from the selling price lines at which he delivered garments of the same category number during March 1942, except that he may sell garments in a lower selling price line than the lowest selling price line at which he delivered garments of the same category number during March 1942.

A manufacturer must not change his customary discounts, allowances and trade differentials, unless the change results in a lower net price.

Highest Price Line Limitation.

MPR 330—8 Federal Register, p. 2210, Feb. 19, 1943.

Sec. 1389.553. Explanation of "highest price line" limitation. In order that the consumer may continue to buy garments at customary price levels, this regulation provides a highest price line rule, or an over-all ceiling rule for each category. The rule is that you may not, under any circumstances, sell any garment at a higher price than the highest price line at which you delivered a garment of the same category number during March 1942. If you did not deliver any garments of the same category number during March 1942, then you may not sell a garment of that category number at a higher price than the highest price line at which your most closely competitive seller of the same class delivered a garment of that category number during March 1942.

Amendment 3.

RMPR 287 — Amendment 3—9 Federal Register, p. 12590-91.

Revised Maximum Price Regulation 287 is amended in the following respects:

2. Section 7(a) is amended to read as follows:

(a) "Selling price line" means the price at which a manufacturer first offered for sale to his generad trade a style of garment on the occasion of its first cutting, and at which a number of garments equal to at least 5% of the number of garments contained in that cutting were delivered. On or before November 1, 1944, each seller who has a selling price line listed on his pricing chart which does not meet these requirements must amend his copy of the pricing chart by deleting such selling price line. Subsequent offers to sell, or sales, of the same style at higher or lower prices are not to be considered as establishing separate selling price lines. Selling prices which differ from the prices customarily established for the general trade because of discounts, allowances, or price differentials for different classes of purchasers do not constitute selling price lines. Sample sales or accommodation sales shall not be considered as establishing a selling price line.

OPPOSITION

BRIEF

INDEX

CITATIONS

739207—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 236

KORACH BROS., A LIMITED PARTNERSHIP,
PETITIONER

v.

EARL W. CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 243–247) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on July 11, 1947 (R. 248). The petition for a writ of certiorari was filed on July 31, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as

amended (50 U. S. C. App., Supp. V, 924 (d)), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether the provisions of Revised Maximum Price Regulation No. 287, governing the selling price lines of manufacturers of various outerwear garments, were arbitrary and capricious or otherwise contrary to law.

REGULATION INVOLVED

The particular portion of Revised Maximum Price Regulation No. 287 here involved (8 F. R. 9122) is set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

In an effort to stabilize the prices of wearing apparel during the war years and to prevent the drying up of the supply of lower-priced garments,[1] Revised Maximum Price Regulation No. 287 utilized the so-called highest price line limitation technique. Simply stated, by this technique the Regulation prohibited manufacturers subject thereto from selling apparel in price lines higher

[1] Among the declared purposes of the Emergency Price Control Act of 1942 (Section 1 (a) 50 U. S. C. App., Supp. V, 901 (a) were the stabilization of prices, the prevention of abnormal increases in prices, the elimination of disruptive practices resulting from abnormal market conditions and scarcities, the protection of persons with relatively fixed incomes from undue impairment of their standard of living, and the assistance of adequate production of commodities.

than those which the manufacturer had (1) sold during December 1, 1941–March 31, 1942, inclusive, and (2) delivered at any time during March 1942.[2] The requirement that the garments in the particular price line have been sold during the four-month base period and that delivery of at least one such garment should have been effected during March 1942 was grounded upon a plethora of economic and other data concerning this manufacturing industry showing that (1) manufacturers engaged in selling any given price line for the spring-summer selling season, the only season covered by the Regulation which is in issue, normally put garments in such price lines into production during the four-month period and delivered such garments no later than March 31, 1942; (2) conversely, those who did not do so, were not successful in establishing themselves in such price lines; and (3) the ability of manufacturers to successfully break into higher than their normal price lines by sales and deliveries after March 31, 1942, was attributable to the abnormal demand and scarcities brought on by

[2] RMPR No. 287, Sections 3, 7 (a), and 15 (a), Appendix, *infra*, pp. 11–12. To qualify in any given price line, the manufacturer was required to have made delivery of but a single garment in that price line during the month of March 1942. In order to prevent manufacturers from qualifying in higher price lines on the basis of "atypical or freakish sales of a very small number of garments" (R. 153), it was further required that a number of garments equal to at least 5% of the first cutting have been delivered (Sec. 7 (a)).

the war, rather than by the normal operation of the market. (R. 64–66, 67–69, 70, 71, 83–85, 116–118, 122, 184, 196–198.) Thus, essentially, the base period which determined the price lines of manufacturers whose prices were regulated by RMPR No. 287 was chosen so as to prevent manufacturers from "trading up" their price lines by reason of the economic conditions which necessitated enactment of the Price Control Act (R. 116–118, 122).[3]

While the Regulation was in effect the petitioner sold dresses subject to the Regulation in price lines of $57 and $66, respectively. However, although petitioner had taken some steps to break into those price lines during late 1941

[3] "The purpose of the highest price line limitation was to minimize the inflationary effect caused by shortage of low priced garments which in part resulted from a tendency by manufacturers to shift their production from lower to higher price lines, where more profit was to be derived per garment. The entire scheme of the regulation was designed to confine manufacturers to their established price lines. The Price Administrator was obliged to formulate a technique for separating the manufacturers who had historically produced goods in the highest price lines from those who had recently moved into that field under the impetus of an inflationary market. It is hardly to be supposed, and the record contains no indication, that a manufacturer who was actually engaged in selling a higher price line prior to March 31, 1942, would have been likely to fail to deliver at least one garment in such line before the end of that month. In fact, in the clothing manufacturing industry, March is historically one of the peak months, if not the peak month, for the sale of spring and summer styles". *Modern Manufacturing Co., Inc.* v. *Fleming*, 160 F. (2d) 892 (E. C. A. 1947), at 895–896.

and early 1942, it had not yet progressed to the point of making any deliveries in those two lines by the close of March 1942. Consequently, the sales in those price lines violated the Regulation; and a damage action pursuant to Section 205 (e) of the Act was brought against petitioner for such violations. (R. 202–203.)[4]

Petitioner lodged a protest against the highest price line provisions of the Regulation with the Price Administrator (R. 1–8). This protest did not question the authority of the Administrator to utilize a system of highest price line limitations but assailed the Regulation on the ground that the requirement that it should have made a delivery in March 1942 was unreasonable and unduly discriminatory (R. 2–4). The petitioner claimed that as a factual matter it had progressed to such a point in the cutting and the taking of orders for the $57 and $66 price lines as to make it plain that it had engaged in the sale of such lines prior to the close of March 1942 although no deliveries of such lines had been made during that month.

The protest having been denied by the Administrator (R. 90, 91–111, 193–198), petitioner filed its complaint with the United States Emergency Court of Appeals (R. 201–209). This complaint was dismissed, the court finding not only that petitioner had failed to demonstrate that the

[4] The enforcement action is pending in the District Court of the United States for the Northern District of Illinois.

Regulation was in any manner unreasonable but that the validity thereof appeared affirmatively from the facts of record (R. 243–247).

ARGUMENT

1. The petition should be denied for the reason that it presents no issue of constitutional law nor any federal question of significance. Resolution of the issue of the validity of the March 1942 delivery requirement of the Regulation centered merely about the highly factual question whether, in the light of the economics of the clothing manufacturing industry, it was a reasonable exercise of the expert judgment of the Administrator for him to conclude that manufacturers generally who were actually engaged in selling in higher price lines prior to March 31, 1942, would normally have made deliveries in such lines during that month. There is, therefore, no warrant for review of the decision of the court below sustaining that judgment.

2. The petitioner, however, urges that review of the validity of the Regulation by this Court is warranted because the decision below allegedly conflicts with the decision of the court below in *Montgomery Ward and Co., Inc.* v. *Bowles,* 147 F. (2d) 858, and with certain language in *Modern Manufacturing Co. Inc.,* v. *Fleming,* 160 F. (2d) 892 (Pet. 13–15, 20–21). In the *Montgomery Ward* case the utilization of a March 1942 delivery test under Maximum Price Regulation No.

330 for determining highest price lines for retail stores was invalidated on the ground that, as a factual matter, it was unreasonable to attempt to separate retailers who historically traded in higher price lines, from those who did not, by the test of delivery of any given price line during a single month, for the reason that the myriad of factors resulting in the making or withholding of delivery of goods at the retail level during any particular thirty-day period destroyed the validity of the assumption that absence of delivery in that period was indicative of absence of historical trading in that price line. The distinguishing factors affecting production, sales and deliveries by manufacturers, as opposed to sales and deliveries by retailers were, however, considered at length by the United States Emergency Court of Appeals in the *Modern Manufacturing Co.* case, which presented a situation substantially similar to that of petitioner; and upon full consideration of the economics of the clothing manufacturing industry, as contrasted with those of the retail industry as developed in the *Montgomery Ward* case, the court concluded that the March 1942 delivery test had a rational basis in fact as applied to manufacturers such as petitioner. The Modern Manufacturing Company's petition for a writ of certiorari to review the identical question now sought to be reviewed at the instance of the petitioner here was subsequently denied by this Court on June 16, 1947.

Petitioner, in order to avoid the conclusive character of the rulings in the *Modern Manufacturing* case, urges that the decision below is inconsistent with the "language of the opinion" in that case, although petitioner carefully refrains from asserting that the decision below conflicts with the holding of that case (Pet. 20–21). The one sentence quoted from the *Modern* decision in the petition (Pet. 20) cannot hide the fact that the United States Emergency Court of Appeals in that case squarely sustained the Regulation against the attack leveled at it here.[5] Thus, there is nothing to petitioner's claim of inconsistency in the decisions of the court below with respect to the Regulation under discussion.

3. Petitioner also claims that the court below erred in failing to find that the highest price line

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[5] In the *Modern Manufacturing* case the complainant had taken preliminary steps to engage in higher price lines prior to the close of March 1942 but had not yet reached the point of cutting garments or of making deliveries until after March 31, 1942. Here petitioner also made no deliveries of the price lines in issue until after March 31, 1942, although it had engaged in cutting those lines prior to the close of that month. This difference in the degree to which *Modern Manufacturing Company* and petitioner had attempted to "break into" higher price lines in the first part of 1942 was noted by the court below and found to be without legal significance. Of course, the adverse impact of the Regulation upon petitioner by reason of the circumstances surrounding its production and delivery methods would in no event demonstrate that the Regulation was not generally fair and equitable to the industry at large. *Gillespie-Rogers-Pyatt Co.* v. *Bowles*, 144 F. (2d) 361 (E. C. A. 1944).

provisions of the Regulation in issue were repealed by Section 12 (b) of the Price Control Extension Act of 1946, which amended Section 205 (e) of the original Price Control Act.[6] A mere reading of the amendment demonstrates that this claim is specious. All that it did was to permit a manufacturer in petitioner's position to make an application to the Administrator for the discontinuance of pending enforcement proceedings, with review in the United States Emergency Court of Appeals of any adverse determination by the Administrator; and petitioner has at present pending in the court below a complaint against the denial of relief under that amendment.[7] Indeed, the very enactment and existence

[6] The amendment reads as follows (P. L. 548, 79th Cong., 2d Sess., § 12 (b)): "The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on which such proceeding is based consisted of the manufacturer's selling an item at his published March 1942 price list prices instead of his March 1942 delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March 1942 delivered prices. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204."

[7] When Congress desired to proscribe the use of highest price line provisions by the Price Administrator, it did so in no uncertain manner. For, as to retailers and service establishments the authority of the Administrator to maintain highest price line provisions in regulations was specifically withdrawn by Congress by subsection 2 (k) of the Price Control Act, which was added by Section 102 of

of the amendment itself bears eloquent testimony to the fact that there existed in the Price Administrator full statutory authority to promulgate regulations containing highest price line limitation provisions.

CONCLUSION

The decision below is correct and there is no warrant for review of the question presented by the petition. The petition should, therefore, be denied.

Respectfully submitted.

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SEPTEMBER 1947.

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the Stabilization Extension Act of 1944 (58 Stat. 632), and further amended by Section 9 of the Price Control Extension Act of 1946 (P. L. 548, 79th Congress, 2d Sess.) so as to read as follows: "No regulation, order, or price schedule issued under this Act shall, after the effective date of this subsection, require any seller of goods at retail or any operator of any service establishment to limit his sales with reference to any highest price line offered for sale by him at any prior time." There is no comparable statutory provision concerning manufacturers.

APPENDIX

The pertinent provisions of Revised Maximum Price Regulation No. 287 are as follows:

> Section 3. *Pricing of garments by manufacturers* * * *[1]
>
> (a) *Pricing Chart.*—Before selling or delivering any garment priced under this regulation, the manufacturer must prepare a pricing chart containing:
>
> (1) A list of the category[2] numbers delivered during March 1942.
>
> (2) A list of each of the "selling price lines" delivered during March 1942, in each category number.
>
> Section 7 [as amended, 9 F. R. 12591]. * * *
>
> (a) *"Selling price line"* means the price at which a manufacturer first offered for sale to his general trade a style of garment on the occasion of its first cutting, and at which a number of garments equal to at least 5% of the number of garments contained in that cutting were delivered. On or before November 1, 1944, each seller who has a selling price line listed on his pric-

[1] This language appeared in Section 3 of unrevised MPR No. 287, 7 F. R. 10460. Its requirements were continued in effect by Section 3 of the revised regulation, 8 F. R. 9122, 9 F. R. 974.

[2] For purposes of convenience Section 27 of the regulation grouped the various types of garments in "categories," such as "Category 1—women's coats, sizes 32 and up," etc.

The sales by petitioner which are in issue were in Category 22, "misses' and Jr. misses'," dresses, "sizes from 7 to 20, inclusive."

ing chart which does not meet these requirements must amend his copy of the pricing chart by deleting such selling price line. Subsequent offers to sell, or sales, of the same style at higher or lower prices are not to be considered as establishing separate selling price lines. Selling prices which differ from the prices customarily established for the general trade because of discounts, allowances, or price differentials for different classes of purchasers do not constitute selling price lines. Sample sales or accommodation sales shall not be considered as establishing a selling price line.

Section 15 [as amended, 9 F. R. 974]. *Prohibitions.*—On and after June 29, 1943, regardless of any contract or other obligation:

(a) No manufacturer shall deliver any garments in a selling price line higher than the highest selling price line listed for a garment of the same category number on his pricing chart in effect on the date of delivery * * *.

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